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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

MARCELLO SISON SARMIENTO,

Defendant and Appellant.

A099056

(San Francisco County
Super. Ct. No. 179548)

INTRODUCTION

Marcello Sison Sarmiento was convicted, following a jury trial, of second degree murder (Pen. Code, § 187)¹ and personal use of a dangerous and deadly weapon (§ 12022, subd. (b)). On appeal, Sarmiento contends the prosecutor committed prejudicial misconduct in closing argument by attacking the integrity of defense counsel and accusing him of seeking to mislead the jury. We disagree and shall affirm the judgment.

PROCEDURAL BACKGROUND

On July 6, 2000, Sarmiento was charged by information with the murder of V.R. in violation of section 187. The information also charged Sarmiento with personal use of a dangerous and deadly weapon, a knife, in violation of section 12022, subdivision (b).

¹ All further statutory references are to the Penal Code, unless otherwise indicated.

On February 21, 2002, a jury found Sarmiento guilty of second degree murder and found the knife allegation to be true. The court, on April 25, 2002, sentenced Sarmiento to a term of 15 years to life, plus one year for the knife-use enhancement.

Sarmiento filed a timely notice of appeal on May 29, 2002.

FACTUAL BACKGROUND

Prosecution Case

In the early morning hours of October 29, 1999, Sarmiento's son awoke twice to a loud argument between Sarmiento and the victim, V.R.² Sarmiento's son testified that his parents often argued loudly. This final argument between V.R. and Sarmiento centered on Sarmiento's belief that V.R. was cheating on him. After Sarmiento's son awoke a second time, V.R. came into his bedroom screaming. Sarmiento followed V.R. into the room with a knife in hand. V.R. attempted to keep Sarmiento out of the room by closing the door, but his arm got in the way. Sarmiento forced his way into the room. Sarmiento's son unsuccessfully tried to remove the knife from his father's hand. Sarmiento stabbed V.R. several times and then stabbed himself. Sarmiento's son called 911 and ran downstairs.

When the San Francisco Fire Department arrived, paramedic Marco Carniglia found V.R. and Sarmiento in a large pool of blood. Carniglia and his partner determined that V.R. was dead, and that nine stab wounds to the chest and abdomen had critically injured Sarmiento.

Sarmiento's blood-alcohol level was found to be .1 percent and his blood contained cocaine. V.R.'s blood contained no detectable substances.

Darren Yardley, a neighbor, later told inspectors that Sarmiento was "volatile." He testified he had heard 30 to 40 loud arguments at V.R. and Sarmiento's house, with Sarmiento's voice predominating, but he never called the police and was never concerned for anyone's safety. Yardley testified that Sarmiento was obsessed with issues of infidelity.

² The victim was Sarmiento's girlfriend and Sarmiento's son's mother.

Sarmiento's ex-wife, Josephine P., testified that after their divorce Sarmiento began to make bizarre accusations that their daughter was not his and that Josephine P. was having an affair. She testified that the accusation typically occurred after Sarmiento had been drinking or using drugs. Eventually, the accusations were accompanied by threats.

After a physically abusive incident in September of 1997, the police removed Sarmiento from Josephine P.'s home. He subsequently threatened Josephine P. and went as far as stalking her and leaving nasty letters on her car windshield. She filed a restraining order against Sarmiento in 1998. Josephine P. commented on her fear that Sarmiento would hurt her if she became involved with this case.

Defense Case

Sarmiento testified that he met his ex-wife, Josephine P., in 1980 or 1981, and that he met V.R. shortly thereafter. Sarmiento said the two women were aware of each other, and he continued a relationship with Josephine P. after their divorce.³ Sarmiento had a daughter with Josephine P. About a year after his daughter's birth, Sarmiento believed his ex-wife was cheating on him, which caused him to leave and stay with V.R. Conflicts arose in the Sarmiento-Josephine P. relationship, causing it to end in 1996 or 1997.

Sarmiento denied threatening to kill Josephine P. over her supposed infidelities. He testified that he did not grab and shake Josephine P. with intent to hurt her, and the black eye she received was unintentional. Sarmiento testified that Josephine P. would call the police as a means to start a fight and control him.

In late 1995, Sarmiento developed suspicions regarding V.R.'s infidelities when he saw her exit an unfamiliar white car. Sarmiento became jealous and an argument with V.R. ensued. About two years before V.R.'s death, Sarmiento noticed V.R.'s car was very clean and the tires had been rotated. He took this as evidence of her infidelity, since

³ Josephine P. testified that about 10 years ago she and V.R. were involved in a physical confrontation.

he had typically maintained V.R.'s car.⁴ Sarmiento said he did not threaten V.R. regarding his suspicions of another man. Several months before V.R.'s death, Sarmiento asked his son if his mother was having an affair. In the month before V.R.'s death, V.R. and Sarmiento often argued over Sarmiento's accusations of her infidelity.

Sarmiento testified that he had little recollection of the October 29 incident and no recollection of stabbing V.R. or himself. At the time of Sarmiento's testimony, he still believed V.R. was unfaithful to him.

Dr. Jan Kurt Horn, Professor of Surgery at the University of California, San Francisco, testified that when Sarmiento arrived at San Francisco General Hospital he had an extremely low blood pressure, was in a coma, in deep shock and on the verge of death. Sarmiento had eight or nine wounds to the chest area and one wound in the subxiphoid area, where the chest cavity ends and the abdominal cavity begins. Horn testified that oxygen deprivation to the brain could have resulted in brain damage and Sarmiento's failure to recall the events of October 29.

Psychiatrist Roderick Pettis interviewed Sarmiento multiple times. He believed, with over 90 percent certainty, that Sarmiento suffered from a "psychotic level disorder, namely, [a paranoid] delusional disorder with a subtype of jealous type." Sarmiento's jealousy was "characteristic for the delusion disorders." His disorder was not caused by his substance abuse.⁵

Rebuttal

The prosecution's rebuttal included the testimony of psychologist Ronald Roberts. Roberts, after reviewing various records and conducting two interviews with Sarmiento, concluded Sarmiento suffered from a personality disorder with "borderline character traits," which affected the way he dealt with significant people in his life. Individuals

⁴ Sarmiento considered a missing can of sardines and a handwritten title on cassette tapes as evidence of V.R.'s infidelity. He also inspected V.R.'s bra and underwear for evidence that she had been with another man.

⁵ Sarmiento testified that he would be jealous whether or not he was under the influence of cocaine.

with “borderline characteristics” often experience inappropriate anger. Sarmiento also had narcissistic tendencies, which required “excessive admiration from other people.” Sarmiento referred to V.R. as a “trophy” during his interviews, which was consistent with his narcissistic tendency. Roberts additionally diagnosed Sarmiento with a delusional disorder jealous type. Roberts’s belief was that this delusion caused Sarmiento to conclude Josephine P. and V.R. had been unfaithful.

DISCUSSION

Sarmiento contends the prosecutor committed misconduct during closing argument by “attacking the integrity of defense counsel and accusing him of seeking to mislead the jury.” Respondent counters that the prosecutor’s comment “was not a personal attack on defense counsel’s integrity, and was fair argument . . . in light of the strong evidence of express malice murder.”

During closing argument, the prosecutor told the jury: “The reason why the defense attorney wants to talk about these things [i.e., Sarmiento’s alleged psychological disorder] is because there is no defense in this case. There’s no defense. His job is to muddy the waters, to stir up smoke. Imagine, if you will, you’re in a room. The truth is in the room. It’s right over there, right in the corner. You can see it clearly. Mr. Rosen’s job is to stand there and create smoke, blow it in the room so you can’t see.” Defense counsel objected to the prosecutor’s comments, stating, “Okay. That’s improper. That’s not my job and counsel knows it. I’d ask the jury be admonished.” The court refused to admonish the jury, but asked the prosecutor to move to other areas of her final closing argument.

“When a defendant makes a timely objection to prosecutorial argument, the reviewing court must determine first whether misconduct has occurred, keeping in mind that ‘ “[t]he prosecution has broad discretion to state its views as to what the evidence shows and what inferences may be drawn therefrom” ’ [citation] Second, if misconduct had occurred, we determine whether it is ‘reasonably probable that a result more favorable to the defendant would have occurred’ absent the misconduct. [Citation].” (*People v. Welch* (1999) 20 Cal.4th 701, 752-753.)

“ ‘ . . . “ ‘ A prosecutor’s . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct “so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.” ’ ’ ’ ’ ” (*People v. Hill* (1998) 17 Cal.4th 800, 819.) “But conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves ‘ “the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.” ’ [Citations.]” (*People v. Espinoza* (1992) 3 Cal.4th 806, 820.)

In the present case, the prosecutor’s statement suggested defense counsel’s job was “to stir up smoke . . . and create smoke” Sarmiento argues that the prosecutor’s comments were an attack on defense counsel’s integrity and therefore misconduct. We disagree.

In *People v. Marquez* (1992) 1 Cal.4th 553, 575, our Supreme Court found that a prosecutor’s comment that defense counsel laid down a “heavy, heavy smokescreen . . . to hide the truth from [the jury]” constituted fair comment in response to the defense’s case. Although the defendant in *People v. Marquez* failed to object to the prosecutor’s comment of a “heavy, heavy smokescreen,” the court nonetheless determined the smokescreen analogy was not misconduct, but proper argument. (*Id.* at p. 576.)

In *People v. Cunningham* (2001) 25 Cal.4th 926, 1002, our Supreme Court again found that comment by a prosecutor that defense counsel’s job is “to put up smoke, red herrings,” was not reasonably likely to improperly influence the jury. The prosecutor in *People v. Cunningham* commented that defense counsel did a “heck of a good job” putting up smoke. (*Ibid.*) The prosecutor followed the comment by characterizing a prosecutor’s job as showing the jury “where the truth lies.” (*Ibid.*) The court held that the prosecutor’s allegation that defense counsel was attempting to hide the truth from the jury with a smokescreen should be viewed as requesting the jury not to be misled by the defense’s version of the evidence. Therefore, the statements were not a personal attack on defense counsel nor did the statements constitute misconduct. (*Id.* at p. 1003.)

Similarly, in this case the prosecutor employed “smoke” and “muddy water” analogies to show defense counsel’s desire to steer the jury away from “the truth.” The

prosecutor's statement came prior to the prosecutor's request to the jury that it not "be distracted in this case from the trail of the truth" The prosecutor's comments were in effect a request to the jury that it not be misled by Sarmiento's jealous delusion disorder defense.⁶

Sarmiento likens this case to *People v. Herring* (1993) 20 Cal.App.4th 1066. In *People v. Herring*, the prosecutor remarked as follows: "[M]y people are victims. His people are rapists, murderers, robbers, child molesters. He has to tell them what to say. He has to help them plan a defense. He does not want you to hear the truth." (*Id.* at p. 1075.) In that case, the Second District Court of Appeal stated that the prosecutor's comments implied defense counsel's clients are "necessarily guilty of heinous crimes." (*Ibid.*) Furthermore, the court concluded that, by stating that defense counsel did not want the jury "to hear the truth," the prosecutor implied he had knowledge of facts not in evidence, amounting to unsworn testimony in violation of the Sixth Amendment right to confrontation. (*Id.* at pp. 1076-1077.)

This case is distinguishable from *People v. Herring*, *supra*, 20 Cal.App.4th 1066 in that here the prosecutor did not characterize all of defense counsel's clients as necessarily guilty, nor did she accuse counsel of telling his clients to lie in court. Furthermore, the prosecutor's comments did not suggest the prosecutor was aware of facts not in evidence. To the contrary, the comments suggested all the evidence was presented to the jury and that defense counsel, through his "school[ing] in the art of persuasion" (*People v. Gionis* (1995) 9 Cal.4th 1196, 1216), was attempting to steer the jury away from the evidence of Sarmiento's guilt and towards the questionable evidence of Sarmiento's jealous delusional disorder defense. The prosecutor's statements did not constitute misconduct.

The judgment is affirmed.

⁶ The prosecutor compared Sarmiento's jealous delusional disorder defense to the "Twinkie defense."

KLINE, P.J.

We concur:

HAERLE, J.

RUVOLO, J.